IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO. 1052 OF 2001

1. B.G. Khalkar)
2. P.N. Tile)
3. J.N. Sharma)
4. S.P.Zankar)
5. K.R. Dahale.) ..... Petitioners.

versus

1. Mukund Pundlik Rasal)
2. Yogesh Sudhakar Jadhav)
3. Union of India)
4. The General Manager,)
India Security Press, Nashik)
5. The Administrative Officer)
India Security Press, Nashik.)).... Respondents.

ALONGWITH

WRIT PETITION NO. 2941 OF 2001

1. Sunil Prabhakar Chavan
2. Hiraman Kisan Aher ..... Petititioners

versus

1. Mukund Pundlik Rasal & ors. ... Respondents

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Shri P.N. Joshi for the petitioner in W.P.No.1052/01.
Mrs. Nirmala Mangnani for the petitioner in W.P.2941/01
Shri M.S.Karnik for Respondent no.1 in W.P.1052/01.
Shri Sureshkumar with D.A.Debue for Respondent - Union of India in both the petitions.

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CORAM ; V.G.PALSHIKAR &
SMT. NISHITA MHATRE, JJ.

DATED; 16TH FEBRUARY 2005.

ORAL JUDGMENT ; (Per Palshikar, J.)

1. These two petitions involve identical facts and raised identical question of law for adjudication.

They, therefore, are decided by this common order.

2. The Government of India which owns the security press at Nashik desired certain recruitment and therefore Administrative Officer of Security Press, Nashik issued advertisement on 8th May 1999, inviting applications for several posts available for recruitment in the press. One such item of recruitment was to the posts of 5 Fireman Grade-I and 5 posts were advertised to be filled in. The present petitioners, the original applicants in the Original Application before the Central Administrative Tribunal, were amongst the aspirants, who claimed and therefore, applied for recruitment to those five posts of Fireman Grade-I. The selection process was completed as contemplated by law and select list was prepared.

3. Factually the Security Press appointed 12 persons though the advertised number of vacancy was 5 ostensibly for the reason that such recruitment was urgently needed. There was advertisement inviting applications for five posts, but factually recruitment was of 12 posts, thus recruitment of persons to 7 posts was without any advertisement whatever. This action of the respondents was therefore challenged before Central Administrative Tribunal by the persons who were in the select list but were down below, claiming that because

the number of posts were only five, they had prepared themselves in a particular manner in the selection process. Had all the posts (12 in number) being advertised, several other persons apart from the original applicants, would have applied for selection or would have offered themselves for selection Spectrum for the selection being wider for 12 posts. According to the original applicants, therefore, this action of the respondent Security Press, was in violation of the provisions of Article 16 of the Constitution and was therefore liable to be struck down. It was also the contention of the original applicants that it amounts to denial of equality of opportunity in the matter of public employment not only to the petitioners but also to those, who did not apply looking to the number of posts available and therefore the petitioners had the locus standi to challenge the action of the respondent as violation of Article 16 of the Constitution.

4. This application was resisted before the Tribunal by the present respondents. The contention of the respondent then before the Tribunal was that the appointment was made due to exigencies of work, Fireman Grade-I were urgently required and therefore recourse was taken to already prepared select list. A policy decision was taken to make the recruitment immediately

and therefore no advertisement was issued. The tribunal on appreciation of rival contentions held that the action was obviously violation of Article 16 of the Constitution and was therefore liable to be struck down, which accordingly struck it down. The present petitioners challenge that action of the Tribunal.

5. It is the contention of the petitioners in these petitions that the Tribunal exceeded its jurisdiction in setting aside their appointments on the finding of technical breach of Article 16 of the Constitution. According to the petitioners, the deviation of the mandate of the Article 16 was permissible in the facts and circumstances of this case. There was fire in the security press and the subsequent enquiry revealed into inadequacy of Fireman Grade-I and therefore recourse was taken of these appointment and the violation of Article 16 is therefore technical and was liable to be condoned and ought to have been condoned by the Tribunal. Direction is claimed from this court to correct that error.

6. Shri P.N.Joshi the learned counsel on behalf of the petitioners, took us through various judgments of the Supreme Court of India to contend that minor deviation from the rule of equality under Article 16 can be

permitted in exceptional circumstances. The contention further is that the circumstances of fire in the security press and inadequacy of Fire personel was one such situation where deviation ought to be permitted. This submission was stoutly opposed by the learned counsel Mr. Karnik on behalf of the applicants in the Original Application. The submission of Mr. Karnik stated in nutshell is that there can be no infraction of Article 16. It is the fundamental right of the citizens and if this exception as canvassed on behalf of the petitioner is accepted, it may become a tool in the hands of employing authorities to crate circumstances so as to fit in this exception and make regular appointments in the face of Article 16 of the Constitution. According to the learned counsel, all the authorities of the Supreme Court of India relied upon by Shri P.N.Joshi do protect and re-iterate the basic principle of law that there can be no violation of Article 16 and pointed out that the protections in some cases were granted by the Supreme Court of India to do complete justice. Analogous power according to the counsel is not available under Article 226. Apart from that we will have to consider these submissions in light of the fact that laying down such law in the State of Maharashtra, making it permissible to carve out the exception to Article 16, would have far

reaching effect. We therefore propose to consider these submissions in depth.

7. When the Constitution of India has given to people of India on 26-1-1950 the right to employment under the public sector and made its fundamental right in the citizen of India, looking to the paucity of employment then available. After 54 years of the Constitution, and its working the position has worsened in many respects. Unemployment is increasing and getting of employment is becoming difficult in many fields. Unemployment has acquired vast proportions, equally powerful, therefore is the need of employment. It was with this intention that Article 16 mandated that the State shall maintain equality of opportunity in the matter of employment in the State. The article is therefore liable to be implemented with more rigour than what it required in the year 1950 and for that matter in the first decade of the Constitution.

8. In our opinion, the right to equality as disclosed in our preamble, is the basic structure of the constitution, promises equality of Status and of opportunity. This equality of Status and opportunity is more clearly worded in Articles 14 and 16 of the Constitution. Article 14 reads thus.

"**14. Equality before law** - *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."*

Article 16 pertains to employment and reads thus:

"16. Equality of opportunity in matters of public employment -

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regasrd to a class or classes of employment or appointment to an office udner the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for thereservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making anyprovision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented inthe services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled

vacancies or a year which are reserved for being filled up in that yeaqr in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be fille dup in any suceeding yeaqr or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent, reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational inistitution or any member of the governing body thereof shalkl be a person professing a pasrticular religion or beloinging to a particular denomination."

9. It will be seen from the framework of the Constitution that the clauses mentioned in the preamble of the Constitution are made elaborate in Articles 14 and 16 of the Constitution and all that forms basic structure of our Constitution and therefore as laid down by the Supreme Court of India in several of its judgments, this basic structure is inviolate and it cannot be whittled down. It will be seen that in effect Article 16 itself is an exception to Article 14 for assertion and permits making of law for the upliftment of downs. All amendments of this Article 16 were intended to clarify or amplify the basic intention of the Constitution namely granting of equality of status and opportunity. Then provision is made for making of special laws for upliftment of classes which

would not have been possible otherwise. Such special laws are necessary for the people of backward classes because then they can enjoy the better fruits of equality by first becoming equal to the others after enjoying the protection granted by the exception mentioned in Article 16. Each amendment is therefore intended to first make all citizens of India equal and then it is mandated, there shall be equality of status and oppportunity. In our opinion therefore these exceptions regarding reservations will have to be construed strictly as has been done by the Supreme Court of India in several cases.

10. It provides therefore that there shall be equality of opportunity in the matter relating to employment or appointment to any office under the State and then it proceeds to carve out the exceptions for which the equality clause may be ignored. These exceptions have been carved out after great amount of thinking and in all great wisdom of the members of the Constituent Assembly. These exceptions protect certain backward classes of society. It protects women and children, it protects persons belonging to Scheduled Caste and Scheduled Tribes. It will be obvious from these exceptions that had they not been incorporated in Article 16 even doing of what is obviously necessary

for benefit of the classes, could not have been done in the face of mandate contained in clause (1) of Article 16. By clearly defining the exceptions to the generality of clause (1), framers of the Constitution of India have clearly indicated that only these, and no other exceptions can make inroad on the right of the equality given by Article 16. We have to consider the submission of Shri Joshi in this background and the need of observing this equality in the present circumstances where unemployment is galore.

11. The Supreme Court of India while interpreting Articles 14 and 16 in its various shades and colours has always laid emphasis on the fact that equality clause cannot be touched except in rare cases covered by the exceptions of Article 16. Article 14 has been interpreted very liberally for protection of the equality clauses contained therein. Now even executive actions or administrative actions, if they are perverse, arbitrary, can be interfered with in writ jurisdiction by the Supreme Court of India or this Court to protect the guarantee given by Article 14. The extent to which interference is found to be permissible by this court and the Supreme Court of India for protection of Articles 14 and 16 has widened substantially in the last two decades. The reason is

obvious. It was to protect the equality in the matter of employment, equality in the matter of treatment equality in the matter of protection of laws. It is therefore, difficult for us to accept the contentions of Mr. Joshi that the exception is liable to be made in the present case looking to the contingency or exigency in which the appointments were made.

12. Before we proceed to analyse the legal situation and the case law, we would like to formulate the question or the exact submission made on behalf of the petitioners. According to the learned counsel the mandate of equality of opportunity in the matter of employment can bare, exceptions in addition to what has been stated in clauses 2 to 5, and the exceptions need not be always in the form of statutory exceptions and even policy decision to that effect may suffice in a given situation. We have to see if such carving out of that exceptions is permissible in our constitution.

13. We will now examine the submissions of Shri Joshi in light of the observations made by the Supreme Court of India in various judgments on which reliance was placed by him.

14. In the case of **Hoshiar Singh Vs. State of Haryana**

and others reported in 1993 Supp (4) S.C.C. page 377 the Supreme Court has held that selection of candidates in excess of the number requisitioned is illegal. In that case advertisement was for 8 posts. However 18 persons were appointed. There the selections were quashed as violative of Article 16, but permission was granted to the candidates selected in excess to appear for the fresh list. This judgment therefore confirms our belief that Article 16 cannot be violated.

15. The next judgment is in the case of **State of Bihar and another Vs. Madan Mohan Singh and others reported in 1994 Supp (3) S.C.C. page 308.** In this case the State of Bihar wanted to recruit 32 Additional District and Sessions Judges. The selection process was completed and then Patna High Court held in its Full Court Meeting that any further vacancy within one year against direct recruitment quota would be filled up from merit list already prepared in issuance of the advertisement dated 29-9-1989. The Supreme Court held that such Resolution as invalid. It will thus be seen that even an attempt to carry forward the selection for future vacancy was struck down by the Supreme Court of India as it deprived others who on occurence of such vacancy would have claimed consideration for appointment. It also therefore re-iterated the legal

position that Article 16 is inviolable.

16. Similar is the decision in the case of **Gujarat State Dy. Executive Engineers' Association Vs. State of Gujarat and others reported in 1994 Supp (2) S.C.C. page 591.** In the case of Ashok Kumar & others Vs. The Chairman, Banking Service Recruitment Board & others this position is restated. It is observed that it is a fundamental right of every citizen to claim consideration for appointment to a post under the State vacant posts arising or expected to arise should be notified inviting application from all eligible candidates to be considered for their selection. Therefore recruitment of the candidates in excess of notified vacancies is violative of Articles 14 and 16 of the Constitution.

17. This position is further re-iterated in the case of **Prem Singh and others Vs. Haryana State Electricity Board and others reported in Supreme Court Services Law Judgments 1996.** In that case advertisement was for 62 posts including the anticipated vacancies of 25 but appointments were made for 137 posts and held appointments in excess of 87 posts was therefore invalid. Then the Supreme Court has observed that the court while exercising its extraordinary jurisdiction

cannot mould relief in such a manner as to strike a just balance between the interest of the State and the interest of persons seeking public employment. In the facts and circumstances of that case it was then observed that however in exceptional circumstances or in an emergent situation the State may by taking policy decision deviate from the advertisement and make appointments on posts falling vacant. Heavy reliance was placed on the observations of this court to contend that requirement of more Firemen was an emergent situation and therefore the Administrative heads of the Security Press at Nashik can take policy decision of recruiting more than advertised number. In our opinion, this submission is unacceptable in the present case for the reason that such a procedure was held permissible in exceptional and emergent cases. It was observed that the decision must be of the State for appointment of posts falling vacant. In the present case, number of posts falling vacant was already advertised and for the purposes of making additional recruitment, posts in higher grade were converted into lower grade and then filled up, which even the Supreme Court dicta does not permit.

18. From the above cases, it will be seen therefore that the recruitment in addition to posts advertised is

always held invalid by the Supreme Court of India as violative of Article 16 of the Constitution. In few cases where detailed reasons were given for holding that appointments so made in excess need not be disturbed in that particular cases, is not a ratio of any of those judgments. The petitioners therefore cannot be claimed that they are entitled to be continued in service because more than five years have passed since their recruitment. They were not at fault. But as observed by the Supreme Court of India in the above quoted judgments holding that relief in such circumstances, is not possible as protection of the fundamental right is required to be seen most intently and seriously than temporary needs of the State. There is no adequate material in the present case to warrant such deviation. There is no policy decision by the Governemnt of India permitting such deviation.

19. That takes us to consider the other aspect of the case as to whether the mandate of equality can bare exception in addition to what has been stated in clauses 2 to 5, without there being appropriate amendment to the clauses. We have to read this mandate of equality in its proper perspective in the present day situation. Unemployment in the country is rising

in geometric proportion but the jobs available under the State are not increasing in the same proportion, with the result there is tremendous addition to the unemployment every year. This being the basic scenario to hold that employing authority or the State can make other exceptions to Article 16, such as the Government policy decision to meet the emergent situation or urgent administrative necessity to fill up certain vacancies under the State, would lead disastrous consequences. The State may not do so but other facilities under the State as contemplated by Article 12 of the Constitution may well use its latitude to make irregular appointment to the favoured ones by creating situation in which administrative exigency or government policy could be spelt out and executed. It would become a tool in the hands of other instrumentalities to conveniently ignore the required mandate of Article 16 to suit their need by making such exception by policy decision and taking into consideration the growth of other instrumentalities of the State in the third world today, it would therefore be creating permissible way to flout the mandate of Article 16. That never was the concept of equality in the minds of the framers of the Constitution. In our opinion, the mandate of Article 16 cannot countenance any further inroads except those which the parliament

in its wisdom has chosen to do. We therefore are unable to accept the submission of Shri Joshi.

20. We have already noted above, that the posts advertised were 5 and persons recruited were 12 and it is not a case where the exception can be permitted because it is not a question of one or two posts, but the appointments made is double the number of posts advertised and hence violation of Article 16 of the Constitution is substantial in nature. In our opinion, the impugned order passed by the Tribunal is legal, correct and valid and calls for no interference.

21. Request for continuation of the interim relief for any further period is rejected because no question of constitutional importance is involved, and in our opinion there is no error in our order. Hence request is rejected.

22. In the result the petition fails and it is dismissed. The interim order if any is vacated.

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